

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

GC AVANTECH, LLC

Employer

and

Case 19–RC–273288

**UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND
PIPE FITTING INDUSTRY LOCAL UNION 598**

Petitioner

DECISION AND DIRECTION OF ELECTION

GC AVANTech, LLC (Employer), located in Benton County, Washington, provides engineering, design, fabrication, testing, and technical services to the nuclear and nonnuclear industry for related products and services. On February 24, 2021,¹ United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry Local Union 598 (Petitioner) filed the instant Petition seeking to represent certain employees of the Employer.

The appropriateness of the bargaining unit is not in dispute. The only issue in this case is the method of election, whether the election should be conducted in-person or by mail ballot, and the date, time, and place of election. The parties timely filed their written positions, each seeking a manual election. The parties also agreed to a Stipulated Record, in which they waived their right to a pre-election hearing before a hearing officer in this matter.

The National Labor Relations Board (Board) has delegated its authority in this proceeding to me under Section 3(b) of the National Labor Relations Act (Act). Applying the Board's recent *Aspirus Keweenaw*, 370 NLRB No. 45 (2020) decision to the circumstances in the instant case, I am directing a mail ballot election.

I. METHOD OF ELECTION

A. The COVID-19 Pandemic

The COVID-19 pandemic has had a profound impact on daily life in the United States in the last year. Despite unprecedented efforts to limit transmission, to date almost 30 million

¹ All dates are 2021 unless otherwise indicated.

people in the United States have been infected with COVID-19 and over 540,000 people have died.²

The best ways to limit transmission are well known at this point in the pandemic. The Centers for Disease Control and Prevention (CDC) notes that COVID-19 is “spread mainly through close contact from person to person,” and can be spread through respiratory droplets by individuals within 6 feet or through airborne transmission to individuals “who are further than 6 feet away from the person who is infected or after that person has left the space.”³ According to the CDC, the most important ways to slow the spread of COVID-19 are wearing a mask, staying at least 6 feet away from others, and avoiding crowds, as “the more people you are in contact with, the more likely you are to be exposed to COVID-19.”⁴

Because of the risk of infection associated with gatherings and in-person activities, the pandemic has also impacted the way the Board conducts its elections. Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its guidance on *Polling Locations and Voters* states officials should “[c]onsider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.”⁵ The CDC further states the virus can survive for a short period on some surfaces and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes, but “it is unlikely to be spread from domestic or international mail, products, or packaging.”⁶ To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”⁷

Recent developments regarding the pandemic have been both positive and negative. A positive development has been the rapidly expanding nationwide vaccination effort; as of March 23, more than 45 million individuals, or about 13.7 percent of the United States population, has been fully vaccinated.⁸ A negative development has been the unfortunate emergence of new variant strains of COVID-19, including the B.1.1.7, B.1.351, and P.1. strains.⁹ The CDC has stated that these variants “have mutations in the virus genome that alter the

² CDC, *COVID Data Tracker*, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last viewed March 24, 2021).

³ CDC, *How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last viewed March 24, 2021).

⁴ CDC, *How to Protect Yourself & Others*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last viewed March 24, 2021).

⁵ CDC, *Polling Locations and Voters*, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread . . .”) (last viewed March 24, 2021).

⁶ CDC, *Am I at risk for COVID-19 from mail, packages, or products?* <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last viewed March 24, 2021).

⁷ CDC, *Running Essential Errands*, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (last viewed March 24, 2021).

⁸ CDC, *COVID-19 Vaccinations in the United States*, <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last viewed March 24, 2021).

⁹ CDC, *US COVID-19 Cases Caused by Variants*, <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html> (last viewed March 24, 2021).

characteristics and cause the virus to act differently in ways that are significant to public health (e.g., causes more severe disease, spreads more easily between humans, requires different treatments, changes the effectiveness of current vaccines).”¹⁰ Initial research suggests, as stated by the CDC, “[t]hese variants seem to spread more easily and quickly than other variants, which may lead to more cases of COVID-19.”¹¹ The CDC further cautions that we do not yet know how widely these new variants have spread, how the disease caused by these new variants differs from the disease caused by other variants that are currently circulating, and how these variants may affect existing therapies, vaccines, and tests.¹² As of March 24, the B.1.1.7, B.1.351, and P.1. variants have been confirmed as present in the State of Washington.¹³

B. Background and Position of the Parties

The Employer is engaged in the business of designing, fabricating, and serving water and wastewater treatment equipment. Approximately 12 employees in the petitioned-for bargaining unit are employed in the Employer’s facility in Benton County, Washington. The employees have continued to work on-site during the current pandemic under the Employer’s safety protocols, which include mandatory facial coverings, daily temperature screenings and health questions at the beginning of each shift, regular sanitization and cleaning in conformity with established CDC and local hygienic and safety standards, flexible scheduling, and increased fresh air ventilation with industrial doors open.

The Employer proposes holding a manual election either in a “well-ventilated” area inside its facility or a “large, covered outdoor area.” The proposed election would occur on a single day, on April 6, beginning at 12:00 p.m. The Employer provides an unequivocal commitment to abide by *Memorandum GC 20-10*, “Suggested Manual Election Protocols.” The Employer states that several employees have received at least a first dose of a COVID-19 vaccine.

Petitioner proposes a manual election but prefers an election to be held at the earliest practicable date, March 25, at the start of the employees’ shift.

There is no contention that an outbreak is ongoing at the Employer’s facility. Also, the number of cases in Benton County is decreasing. The John Hopkins University COVID-19 Status Report for Benton County showed 19 cases one day earlier, 33 cases two days earlier, and 22 cases 14 days earlier, although there was significant fluctuation in the middle, including a drop to zero reported cases over the weekends.¹⁴ Benton County does not appear to publish a 14-day testing positivity rate, but the Washington State Department of Health publishes an online COVID-19 Data Dashboard, which shows the 7-day rolling positivity rate by county. There was a 11.3 percent 7-day rolling-average positivity rate as of March 22 and 7.9 percent as of March

¹⁰ Ibid.

¹¹ CDC, *About the Variants of the Virus that Causes COVID-19*, <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html> (last viewed March 24, 2021).

¹² Ibid.

¹³ Washington State Department of Health, *COVID-19 Variants*, <https://www.doh.wa.gov/Emergencies/COVID19/Variants> (last visited March 24, 2021).

¹⁴ <https://bao.arcgis.com/covid-19/jhu/county/53005.html> (last visited March 24, 2021)

15 based on incomplete data. However, the most recent periods with complete data shows a 6.2 percent 7-day positivity rate as of March 4 and 6.8 percent on February 25.¹⁵

C. Board Standard

Congress has entrusted the Board with a wide degree of discretion in establishing the procedures and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) (citing *Halliburton Services*, 265 NLRB 1154 (1982), and *National Van Lines*, 120 NLRB 1343, 1346 (1958)); *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas*, supra at 1144–1145.

The Board’s longstanding policy is that elections should, as a rule, be conducted manually. National Labor Relations Board Casehandling Manual, Part Two, Representation Proceedings, Sec. 11301.2. However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, conducting an election by mail ballot would enhance the opportunity for all to vote. See *id.* This includes a few specific situations addressed by the Board, including where voters are “scattered” over a wide geographical area, “scattered” in time due to employee schedules, in strike situations, or other unspecified extraordinary circumstances. *San Diego Gas*, supra at 1145.

After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April 2020, with many Regional Directors, including this Region’s, directing primarily mail ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in determining when a manual election could be conducted safely, on July 6, the General Counsel issued a memorandum titled “Suggested Manual Election Protocols,” *Memorandum GC 20-10*, setting forth detailed suggested manual election protocols.

In *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), the Board addressed how Regional Directors should assess the risks associated with the COVID-19 pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its long-standing policy favoring manual elections and outlined six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail ballot election:

1. The Agency office tasked with conducting the election is operating under “mandatory telework” status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The employer fails or refuses to commit to abide by *GC Memorandum 20-10*, “Suggested Manual Election Protocols”;

¹⁵ <https://www.doh.wa.gov/emergencies/covid19/datadashboard> (last visited March 24, 2021)

5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

Id. slip op. at 4–7. The existence of one or more of these situations will normally suggest that a mail ballot is appropriate under the “extraordinary circumstances presented by this pandemic.”

Id. slip op. at 4. The Regional Director has discretion to conduct an election by mail ballot under the peculiar conditions of each case. Id. slip op. at 3 (citing *National Van Lines*, supra at 1346). The Regional Director’s determination to conduct an election manually or by mail is subject to an abuse of discretion standard. *Aspirus*, supra, slip op. at 3 (citing *San Diego Gas*, supra at 1144 fn. 4). Finally, in *Aspirus*, the Board noted that a Regional Director who directs a mail ballot election under one or more of the foregoing six situations will not have abused her or his discretion. *Aspirus*, supra, slip op. at 8.

II. DETERMINATION

After careful examination of the record, the parties’ respective positions, and the current state of the COVID-19 virus in Benton County, I have determined that a mail ballot election is the appropriate option.

Several of the *Aspirus* factors are not relevant to my determination in this case. The Region tasked with conducting the election is not operating under mandatory telework status, mandatory state or local health orders relating to maximum gathering size are not at issue, the Employer has committed to abide by GC 20-10, and there is no evidence of a current outbreak at the Employer’s facility. Ultimately, I have determined that a mail ballot election is appropriate in this case due to the remaining two factors: the testing positivity rate in Benton County and the existence of other compelling circumstances.

Regarding the second *Aspirus* factor—whether the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day test-positivity rate in such county is 5 percent or higher—the Board directs Regional Directors to utilize the data published by Johns Hopkins University, or from official state or local government sources. Here, the 14-day trend in Benton County is decreasing. I agree with the Employer that this does not support conducting the election by mail. However, the two recent testing 7-day positivity rate in Benton County, when considered together to establish a 14-day overview, is above the 5 percent threshold established in *Aspirus* and demonstrates wide spread of COVID-19. This supports directing a mail ballot election.

I additionally find the sixth factor—whether other compelling circumstances exist—also supports directing a mail ballot election. Specifically, I find recent changes in the COVID-19 pandemic, and specifically the emerging variants that may pose a greater risk of transmission and serious complications, present such a compelling circumstance. While it is impossible to know how great a threat these variants pose currently, that is precisely the point. At this time the CDC indicates that it is working to learn more about these variants and is studying them to assess how to control their spread, what dangers they pose, and just how prevalent the variants are within impacted communities. What is known is that all three of the variants are confirmed to be present in Washington. Because the discovery of the variants followed the Board’s November 2020 Decision in *Aspirus*, and as such was not considered by the Board in that Decision, I find

the variants constitute a compelling circumstance that is sufficient to support conducting an election by mail.

Moreover, I do not find persuasive the Employer's argument that the receipt of at least a first dose of a COVID-19 vaccine by some employees adequately mitigates risk. At the outset, I note that this argument ignores the fact that individuals could still get COVID-19 just after vaccination and would not even be considered fully protected until two weeks after their second dose of the vaccine.¹⁶ Further, the CDC underscores that "scientists are still learning how well vaccines prevent [individuals] from spreading the virus that causes COVID-19 to others," and "how long COVID-19 vaccines protect people."¹⁷ In any event, I note that there is no assurance that all the employees involved in this case have received vaccination, and almost all the staff in the Regional office responsible for conducting the election are not eligible under the current guidelines.

Finally, I acknowledge that the employees comprising this unit currently report to work and have reported to work throughout the COVID-19 pandemic at the Employer's facility. It is unclear, however, that the employees have been present at the facility at the same time, given that the Employer is using "flexible scheduling" under its safety protocol. Besides, at least two observers and the Board agent, who would not otherwise be at the facility, would have to travel to the Employer's facility for a manual election. To be sure, the Employer's offer to hold an election either at a "well-ventilated" area inside its facility or outside in a "large, covered outdoor area" arguably could mitigate some of the concerns involved with conducting a manual election. But such offer, I find, is insufficient to eliminate the risk of additional spread of infection here especially when the Benton County 14-day testing positivity rate remains above the 5 percent level specified in *Aspirus*.

For these reasons, I have directed a mail ballot election.

III. CONCLUSIONS

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹⁸

¹⁶ CDC, *Key Things to Know*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html> (last visited March 24, 2021).

¹⁷ *Ibid*.

¹⁸ The parties stipulated to the following facts regarding commerce:

The Employer, a South Carolina limited liability company with an office and place of business located in Richland, Washington, is engaged in the business of designing, fabricating and servicing water and wastewater treatment equipment. In the past calendar year, a representative period, the Employer derived gross revenues in excess of \$500,000 and purchased and received at its facility within the State of Washington goods valued in excess of \$50,000 directly from suppliers outside the State of Washington. Accordingly, the Employer is engaged in commerce within the meaning of the Act and is subject to the jurisdiction of the Board. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time welders, electricians, and helpers employed by the Employer at its facility located at Richland, Washington.

Excluded: All other employees, professional employees, office clerical employees, materials coordinator, quality assurance/control employees, engineers, and guards and supervisors as defined in the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY LOCAL UNION 598**.

A. Election Details

I have determined that a mail ballot election will be held. The Petitioner has waived all of the 10 days it is entitled to have the voter list described above.

The mail ballots will be mailed to voters by a designated official from the National Labor Relations Board, Region 19 office on **Friday, April 2, 2021**. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 19 office by 3:00 pm (PDT) on Monday, April 26, 2021. The mail ballots will be counted by a designated official from the National Labor Relations Board at 1:00 pm (PDT) on Wednesday, April 28, 2021, with participants being present via electronic means. The parties agreed in the stipulated record that, in the event I ordered a mail ballot election, only those ballots that arrive in the Region 19 office prior to the due date, which is by 3:00 pm (PDT) on Monday, April 26, 2021 will be counted and that no objections will be filed based upon any such untimely received ballots.

Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be void.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 19 office by no later than April 9, 2021 in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those employees in the unit who were employed during the payroll period ending **March 20, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Tuesday, March 30, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list must be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not

object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the elections on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the

issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: March 26, 2021

Ronald K. Hooks

Ronald K. Hooks, Regional Director
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